92-1569

No. 92-_____

Supreme Court, U.S.
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PETITION FOR WRIT OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1992

ALEX FERREIRA,

Petitioner Pro se

v.

KAONOHI CORP. & SUTHERLAND ET AL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alex Ferreira
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PRO SE PETITIONER
2/25/93

QUESTIONS RAISED

BACKGROUND: The Ninth Circuit dismissed this un-stayed appeal as punishment for pro se appellant Ferreira's civil contempt when he did not post the $165,000 supersedeas bond commanded by the trial judge as a condition of this un-stayed appeal.

A. Shareholder Ferreira's appeal questioned the federal trial court's denial of the right of a large shareholder, under state derivative action statutes, to file a derivative action against all officers of appellee Kaonohi Ohana, a Hawaii corporation in Chapter 11.

B. Appellant Ferreira viewed the derivative action as a corporate asset under bankruptcy law. Ferreira dissented, and was crammed down, and given nothing. Control of the asset he claimed went to someone

with a claim junior to Ferreira's, a possible defendant in the derivative action.

I. FIRST QUESTION: If Ferreira appealed but did not ask for any stay, does the federal trial judge have subject matter jurisdiction, under FRCP 62 and FRAP 8, to command that appellant Ferreira must post a $165,000 supersedeas bond forthwith, on penalty of civil contempt and dismissal of the appeal by the Ninth Circuit?

II. SECOND QUESTION: Should the Supreme Court excuse the finding of civil contempt when:

A. The underlying supersedeas bond command of the federal trial court is transparently invalid, because un-stayed appeals have not had the "effect of a stay" in English and US federal courts since 1772?

B. The under-lying bond command is

transparently invalid also because the trial judge and the Ninth Circuit itself ignored the Ninth Circuit's own precedent in Koster & Wythe v. Massey, which stands for the principle that neither a stay nor a six-figure supersedeas bond may be made a prerequisite for an appeal in all U.S. Circuit courts of appeal?

C. The underlying bond command is not only transparently invalid, but is swiftly appealed, as in the case of US v. Ryan, to demonstrate respect for the rule of law, in a society grown skeptical of the sometimes invalid commands of military officers and trial judges as in My Lai and the King trial?

III. The future derivative action may or may not be filed in Hawaii. It is unclear as to what state's law will

control the derivative action. THIRD QUESTION: If state statutes in many states, such as New Jersey or Hawaii (HRS 415-49), exempt large shareholders such as Ferreira from posting expensive security bonds for costs, expenses and attorneys' fees as a condition of filing a derivative action, does the federal trial judge, who will never ajudicate the state-court derivative action, have subject matter jurisdiction to command that the $165,000 supersedeas appeal bond must be posted now, and must be converted into a six-figure derivative action security bond if and when Ferreira wins this un-stayed appeal?

IV. Did the BAP and District violate pro se appellant's right to due process by failing to read, at the minimum, the jurisdictional defenses raised by pro se appellant in his summary page?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Alex Ferreira, MD, owner of 100% of Class C shares ($400,000) and respondents Kaonohi Ohana Corporation, whose officers are former counsel Boyce Brown of Andorra, former counsel Mary B. Johnson of Maui, and President Joseph Larson of Oregon. Brown and Johnson are not shareholders.

(Sylvester Stallone and the family Sutherland were once parties to this matter, but are parties no longer, having signed a settlement agreement with Kaonohi Corporation).

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I. Appellant asked for no stay, hence did not invoke the jurisdiction of the fed. trial court under FRCP 62 & FRAP 8. Jurisdiction was defective at the threshold as in Howat v. Kansas. This defect should excuse civil contempt. PAGE 20

II. The trial judge commanded Ferreira to post a $165,000 supersedeas bond on penalty of civil contempt and dismissal of this appeal. Transparently invalid because: un-stayed appeals do not

"have the effect of a stay". And invalid because the Ninth Circuit ignores its own precedent: The appellant who does not ask for a stay and does not post a supersedeas bond does not lose his right to an appeal. PAGE 22,23

III. Appellant Ferreira seeks the right to bring a state court derivative action against all Kaonohi's officers. State statutes such as the one in New Jersey, or Hawaii Revised Statute 415-49, are the source of jurisdiction in shareholder derivative actions. The federal trial judge did not have subject matter jurisdiction to command that a large shareholder (Ferreira) must post a six figure derivative action security bond forthwith on penalty of civil contempt and dismissal of this appeal. PAGE 23, 24

IV. The trial judge's six -figure supersedeas bond command in this un-stayed appeal was invalid. It was outrageous.

-Ferreira disobeyed but swiftly appealed the invalid order. The doctrine of US v. Ryan applies here. Civil contempt may be excused if the underlying order is transparently invalid, is disobeyed, but swiftly appealed.

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CONCLUSION: Civil contempt should be reversed because subject matter jurisdiction of the trial court was defective, this defense was raised but ignored by the BAP and District Court, and the supersedeas bond command was transparently invalid. Civil contempt should be reversed too, because the underlying order was invalid, and was disobeyed but swiftly appealed.

A. And this case should be remanded

to the Ninth Circuit for ajudication of the bankruptcy issues.

CONCLUSION PAGES 26, 27, 28

APPENDIX PAGES

A. Federal trial court order (Bankruptcy) denying right to file derivative action. APP. PAGE 1, 2

B. Order Compelling Appellant Ferreira to Post $165,000 supersedeas bond as a condition of appeal to the BAP. APP. PAGE 12

C. Order by District Court finding Dr. Ferreira in civil contempt and dismissing the appeal for not posting supersedeas bond. APP. PAGE 16

D. Ninth Circuit Dismissal of this appeal as punishment for civil contempt for not posting the $165,000 bond commanded by the federal trial judge. APP. PAGE 39

TABLE OF AUTHORITIES

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-Boddie v. Connecticut

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

Alex Ferreira, Petitioner Pro se

v.

Kaonohi Corporation & Sutherland, et al, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The pro se petitioner, Alex Ferreira, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding on Nov. 27, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit dismissing this appeal for civil contempt in not obeying the

$165,000 supersedeas bond command has not been reported. It is reprinted in the appendix hereto, at APP. PAGE 39.

-The District Court order findng Ferreira in contempt of court and dismissing the contempt appeal is on APP. PAGE 16.

-The bankruptcy court order commanding appellant to post a $165,000 supersedeas bond on appeal was entered on July 25, 1991 and is in the appendix at APP PAGE 12.

-The order confirming the Chapter 11 Plan of Kaonohi Corporation and denying pro se petitioner the right to file a derivative action, was entered on April 23, 1991. It has not been reported and is reprinted in the appendix hereto, on APP. PAGE 1, 2.

JURISDICTION

-Petitioner attended confirmation hearings for confirmation of the Chapter 11 plan of Kaonhi Corporation in the winter of 1991. The confirmation order was entered on April 23, 1991.

-A motion after judgement was served on

April 26, 1991 and decided on May 22, 1991.

-Notice of appeal to the BAP was filed on May 30, 1991.

-Notice of appeal to the Ninth Circuit was filed on June 17, 1992.

-The Ninth Circuit dismissed this appeal as punishment for civil contempt in not posting the six-figure supersedeas bond on Nov. 27, 1992.

-Jurisdiction of this court to review the judgement of the Ninth Circuit is invoked under 28 USC Section 1254(1).

STATUTE

The primary defense against civil contempt for not posting a six figure supersedeas bond in this un-atayed appeal was raised by appellant Ferreira but not acknowledged by the District Court and Ninth Circuit. The appellate courts simply did not read the defense of

the defense of DEFECTIVE SUBJECT MATTER JURISDICTION.

Jurisdiction of the federal trial judge was not properly invoked under FRCP 62 and FRAP 8 when appellant Ferreira asked for no stay but was commanded to post a $165,000 supersedeas bond on penalty of civil contempt and dismissal of this appeal.

STATEMENT OF THE CASE

I. Appellant Ferreira is a large shareholder ($400,000) who was denied the right to file a derivative action against all officers of Kaonohi Corp., a Hawaii corporation in Chapter 11, the second Chapter 11 for this Kauai oceanfront project.

-The trial court (Bankruptcy) worried about who would re-imburse the defendants if they prevailed in the future derivative action.

-Ferreira made his "demand" (after reading the "Notes" re derivative actions, Harvard Law Review, 1956). Appellant Ferreira offered to be the the shareholder's derivative action plaintiff, for his own benefit and the benefit of other shareholders.

-Ferreira also offered to re-imburse if he did not prevail.

-(Ferreira has substantial assets in real estate but little cash, and would be able

to re-imburse).

-The Chapter 11 plan was confirmed and is 80% completed.

-Class C (Ferreira) was crammed down and given nothing. Ferreira lost $400,000. UNDER HAWAII STATUTE AND THE BANKRUPTCY CODE, THE CORPORATION AND ITS OFFICERS WILl NOT BE ENTITLED TO A TRUE DISCHARGE IN BANKRUPTCY AFTER THE AUTOMATIC STAY IS FINALLY LIFTED BECAUSE IT IS LIQUIDATING AND GOING OUT OF BUSINESS..

II. Appellant Ferreira once led this project. In 1982, Ferreira encountered financial and health problems. He emerged from Chapter 11 on Dec. 29, 1983.

A. When Ferreira emerged from his own Chap. 11, this land project was solvent, SOLVENT. All its development permits were in place. The real estate market at the beginning of 1984 looked very good. Fact: Kaonohi was solvent when current officers/former counsel took

control of it in Jan. 1984.

III. Demoted now to a being a Class C shareholder, Ferreira was in no way responsible for the ensuing disaster which led to insolvency and a second Chapter 11 for this project. The new officers were attorneys.

-Ferreira alleges that they drafted and signed faulty sales contracts with two different buyers, both of whom ended up with binding contracts to purchase the exact same parcel of Kaonohi's land.

-Ferreira alleges also that the officers curried favor with each set of increasingly more glamorous buyers, to the detriment of the shareholders.

-Years of litigation ensued and both would-be buyers ended up with binding sales contracts to purchase the same parcel of Kaonohi's land. The corporation, very solvent in 1984, lost $700,000, most of it out of shareholder Ferreira's share.

One of the former counsel moved to Andorra with 2 unresolved suits for legal malpractice pending in Honolulu and this derivative action about to be filed. His law partner remains in Hawaii.

IV. In Kaonohi's Chapter 11 plan, shareholder Ferreira was crammed down and given nothing. A future officer-defendant in any derivative action, whose claim to the asset was junior to the claim of Ferreira, was given control (scuttle) the cause of action, the most valuable remaining asset of Kaonohi Corp.

10V. Arcane federal bankruptcy issues were appealed to the BAP. Appellant asked for no stay.

A. 55 days after the notice of appeal, the federal trial judge found that this un-stayed appeal had the "effect of a stay".

B. The federal trial judge commanded appellant Ferreira, a very large shareholder indeed, to post a

$165,000 supersedeas bond forthwith, on penalty of contempt and dismissal of this un-stayed appeal.

C. The District Court and Ninth Circuit repeated the supersedeas bond command and Ferreira refused.

D. Ferreira's offer of alternate security was refused by the trial court as "coming too late".

E. The Ninth Circuit dismissed an appeal of the contempt finding and was silent on Ferreira's defense of defective subject matter jurisdiction of the trial court.

F. The Ninth Circuit punished appellant Ferreira's civil contempt by dimissing all appeal efforts.

REASONS FOR GRANTING THIS WRIT

Intro: Appellant Ferreira is a large shareholder of a corporation in Chapter 11. He filed this un-stayed appeal seeking to bring a state-court derivative action against all officers of Kaonohi Corp. for alleged legal malpractice and fiduciary breach.

I. The Supreme Court should reverse the finding of civil contempt for failure to post the $165,000 supersedeas bond commanded by the federal trial court on penalty of civil contempt. The Supreme Court should also reverse the punishment, dismissal of appellant Ferreira's un-stayed appeal by the Ninth Circuit, because:

A. Appellant Ferreira did not ask for a stay.

B. The federal trial court did not have subject matter jurisdiction, under FRCP 62 and FRAP 8, to command that appellant must post a

six-figure supersedeas bond as a condition of this appeal and on penalty of contempt.

C. Jurisdiction was defective at the threshold, in the sense of Howat v. Kansas. (Howat v. Kansas, 258 U.S. 181, 189-90, (1922), which was quoted in U.S. v. United Mineworkers, 330 U.S. 258, (1947).

(Under the precedent of Howat v. Kansas, if the outcome was to be a supersedeas bond which appellant Ferreira would have to pay for, only appellant could INVOKE the jurisdiction of the trial court, whose order was on un-stayed appeal).

II. But the civil contempt finding and the supersedeas bond command should be reversed also because the bond command by the trial judge was transparently invalid in two ways:

A. The bond command was based on

the invalid notion that an un-stayed appeal can have the "effect of a stay". If the appellee Kaonohi Corp. had a mootness problem it ought to have asked for a discretionary stay. But it is a fact that un-stayed appeals have not had the effect of a common-law stay since the reign of King George III, around 1772, after Parliment passed the Statutes of the Realm, King George III, MDCCCXIX edition, Chapter VIII of Part II of the Fourth Volume. Specific statutes control appeals and stays and supersedeas bonds, specific statutes such as FRCP 62 and FRAP 8. Not common law.

B. The supersedeas bond command was invalid also because all circuits follow the Ninth Circuit precedent of Koster & Wythe v. Massey in the principle that neither a stay nor a

supersedeas bond may be made the prerequisite for the right to an appeal. It was invalid for the Ninth Circuit to ignore its own precedent. Koster & Wythe v. Massey, 262 F. 2d 60, Ninth Circuit, (1958). Moore, Fed. Practice 208.02.

III. The federal trial judge also lacked subject matter jurisdiction under state derivative action statutes which control issues of re-imbursement of prevailing parties in derivative actions.

The trial judge said the six-figure supesedeas bond would also double as a $165,000 pre-trial security bond at the future derivative action. It is not known in what state this derivative action will be filed, but the constitutionality of state derivative action statutes such as Hawaii's HRS 415-49, have been upheld by the Supreme Court.

Hawaii's HRS 415-49 resembles that

of New Jersey, upheld in Cohen v. Beneficial Loan Corporation and quoted by Justice Hugo Black in Boddie v. Connecticut, 401 U.S. 371, (1970). There is a dispute in this case, as to whether a large shareholder such as Ferreira must post an expensive pre-trial security bond. The state statute re derivative actions must control. That statute exempts Ferreira from posting the expensive pre-trial security bond. But we really do not know where the derivative action will be filed. One fact is clear: the federal trial judge will not ajudicate the derivative action. And he did not have jurisdicition under state law to command the derivative action bond must be posted now, while the the appeals process is still going on.

IV. When appellant did not ask for a stay, the trial court's command that he must post a $165,000 supersedeas bond

command on penalty of civil contempt was invalid. It was also outrageous.

Many good citizens, in a society distrustful of the outrageous commands of military officers (My Lai), and of judges in Walker v. Birmingham, the Thin Blue Line and of the verdict in the Rodney King trial, will not blindly obey invalid or outrageous judicial orders.

Pro se appellant humbly suggests that respect for the rule of law is not fostered by the command or expectation of blind obedience of invalid judicial orders.

Professors Wright & Miller tell us of the precedent of U.S. v. Ryan, which provides one way of dealing with this problem: The Supreme Court should allow the citizen to disobey a transparently invalid order, be found in contempt, and swiftly appeal the contempt finding. If and when the appellate courts find that the order was invalid, the appellate

court or the Supreme Court should reverse the invalid order and the contempt finding.

(See Wright and Miller, Section 3537, page 546 re the reasonableness of questioning the validity of a judicial order only if there was no opportunity for effective review of the order before it was violated).

CONCLUSION

The Ninth Circuit erred in dismissing this appeal as punishment of appellant Ferreira's civil contempt.

The Supreme Court should reverse the finding of civil contempt and the supesedeas bond command, and remand the bankruptcy issues because appellant Ferreira did not ask for a stay. Thus, the judge did not have subject matter jurisdiction, under FRCP 62 and FRAP 8, to command appellant to post a six-figure supersedeas bond on penalty of contempt.

Moreover, under the principles of

Howat v. Kansas, when Ferreira asked for no stay, no one except appellant could properly invoke the threshold jurisdiction of the court in the matter of any supersedeas bond which appellant Ferreira would have to pay for.

The contempt finding should be reversed too, because the bond command was transparently invalid. Un-stayed appeals have not "had the effect of a stay" in U.S. federal appeals since the late 1700's.

It is also transparently invalid for the Ninth Circuit to violate its own precedent in Koster and Wythe v. Massey, (the appellant who does not ask for a stay and does not post a supersedeas bond does not lose his right to an appeal). The civil contempt should be reversed.

Finally, the civil contempt should be reversed if the order was invalid, and there was no opportunity to appeal the underlying supersedeas bond command

before disobeying it. This principle was espoused in U.S. v. Ryan and is supported by Professors Wright and Miller. This principle is reasonable in a society where decent citizens have reached a consensus: they will not obey the invalid orders of trial judges and military officers, physicians, clergy and political officials.

Pro se appellant Ferreira asks this court to grant this writ of certiorari and reverse the finding of civil contempt, to reverse the bond command and to remand the bankruptcy issues to the Ninth Circuit.

Alex Ferreira, M.D.

Respectfully submitted,
Alex Ferreira, M.D.
Pro se appellant
14911 National Ave.
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408-356-8161.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF HAWAII

In re

KAONOHI OHANA, LTD.
Debtor

CASE NO. 86-00221
Chapter 11

Judge Jon Chinen

NOTICE OF ENTRY OF ORDER OR JUDGEMENT

NOTICE IS HEREBY GIVEN that on April 18, 1991 this court entered on the docket of the above entitled case the followng order or judgement to wit:

Order Confirming Second Amended Plan of Reorganization (Supplemented)

When the time for appeal has expired (without appeal being taken), counsel must arrange for pickup of their exhibits without further notice.

Dated at Honolulu, Hawaii, April 23, 1991.

Dorothy Ippongi
Clerk, Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
DISTRICT OF HAWAII

In re

KAONOHI OHANA, LTD. CASE NO. 86-00221
Debtor Chapter 11

ORDER 1) DENYING REQUEST BY DR. ALEx FERREIRA AND STEPHEN FERREIRA TO ASSIGN ALLEGED CLAIM TO SUE OHANA'S DIRECTORS, AND 2)) CONFIRMING SECOND AMENDED PLAN OF REORGANIZATION (SUPPLEMENTED).

The debtor's Second Amended Plan of Reorganization (Supplemented) ("Plan") under Chapter 11 of the Bankruptcy Code filed by Kaonohi Ohana Ltd., on Dec. 13, 1990, having been transmitted to creditors, equity security holders, and all parties entitled to notice; and
A hearing having been held on Feb. 6, 1991, at 2 PM, after due notice to creditors, and all parties entitled to notice; Eliz. Kent and Corey Park appeared on behalf of the Debtor,; Ronald Sakimura appeared on behalf of Sylvester

Stallone, Gayle Lau appeared on behalf of the US Bank-ruptcy Trustee; and Dr. Alex Ferreira,Class C shareholder and Stephen Ferreira, Class B shareholder, appeared pro se; and,

A further hearing having been held on March 20, 1991, at 8:45 AM, after due notice to creditors, equity holders, and all persons entitled to notice, concerning the request by Dr. Ferreira and Stephen Ferreira, Class B for assignment of certain claims and the question of the indemnification of the Directors of Kaonohi Ohana Ltd.; Eliz. Kent and Corey Park appeared on behalf of the debtor; Ronald Sakimura appeared on behalf of Sylvester Stallone; and Dr. Alex Ferreira, Class C shareholder, and Stephen Ferreira, Class B shareholder, appeared pro se; and

After due consideration of all the

memoranda and letters submitted to the Court, and after due consideration of the matters raised at the hearings, the Court finds as follows:

1. The only substantive objection to the Plan was raised by the sole Class C shareholder, Dr. Alex Ferreira, in which he was joined by his brother, Stephen Ferreira, a Class B Shareholder)"the Ferreira´s"). The substance of that objection was the Ferreira´s claim that Boyce Brown, one of Ohana´s directors, and the officer who was handling the Debtor´s affairs, acted improperly in th sale of the Debtor´s property. The Ferreira´s requestedd that the Debtor be required to assign to them the alleged claim agaist Brown, as well claims against th remaining directors, since the corporation had decided not to pursue those claims on its own.

2. At the March 20, 1991 hearing, held specifically to address the Ferreiras' request for the assignment, Dr. Ferreira mentioned they were not yet certain whether the suit against any or all of the Directors was warranted and that, after the suit was brought , if the facts did not warrant such a suit, they would drop it. The Court finds that the bringing of a suit at this time would be violation of Rule 11, FRCP, and Rule 9011, Rules of te Bankruptcy Court. Moreover, as discussed below, such as suit would further delay distribution to the shareholders/creditors. The court notes that there already have been long delays in this bankruptcy. Additional delays would bring further prejudice to the shareholders/creditors. In so ruling, the Court takes no position as to the merits of the alleged cause of action

asserted by the Ferreiras.

3. With respect to the Ferreiras' claims, the Court notes that Boyce Brown acted only after Judge King ruled that Section 416-33, Hawaii Revised Statutes (since repealed), applied to the first sale document with Sutherland and that Kaonohi was required to obtain approval of at least seventy five percent (75%) of its shareholders to sell Kaonohi Point. Since that approval had not been obtained for the first DROA, Ohana had no obligation to sell to those offerors. In short, Mr. Brown acted only after obtaining Judge Kings's ruling that, if effect, he did not have any obligation to sell to the fist offerors.

4. The court finds that if the assignment as requested by the Ferreiras is made, and if the Ferreiras were not successful in their action, then the

directors would be entitled to indemnification from Kaonohi Ohana, Ltd. pursuant to Section 415-5(d), Hawaii Revisd Statutes. In order to fulfill this duty to indemnify, Ohana would be forced to retain funds to reimburse the directors if they were successfl in defending the Ferreiras' caims. The Court therefore finds that the bringing of any action against any director would thereby significantly delay any disbursement that should be made to the shareholders/creditors. Furthermoere, this could reduce the disbursement to the shareholders/creditors because indemnification costs would deplete the funds that would otherwise go to the shareholders/creditors. Therefore, the Ferreiras' requstd asignment of the alleged claim against the Board of Directors shall be denied.

5. The Court has reviewed two letters from Class A shareholders, Karen Moore and William Ramsell, both begging for confirmation of the Plan and to be paid. The Court also notes Ms. Kent, counsel for the Debtor, has spoken to two other shaeholders, Dr. John Colwell, a Class B shareholder, and Joe Larson, who holds both Class A and Class B shares, who both request confirmation of the Plan and a distribution as soon as possible.

5. (sic) The Court finds that allowing the Ferreiras to bring an action against the Board of Directors and to thus dalay payment to the innocent shareholders would be unfair because of the delay in payment to those shareholders/creditors and because those shareholes might not receive payment in full.

6. The Court therefoe finds that it

is in the best interests of the shareholders/creditores to confirm the Debtor's Plan and to deny asignment of the alleged claim to the Ferreiras.

THE COURT FURTHER FINDS THAT:

1. The Plan has been accepted in writing by the requisite number of creditors and equity holders whose acceptance is required by law.

2. The provisions of Chapter 11 of the Code have been complied with; that the Plan has been proposed in good faith and not by any mans prohibited by law.

3. The Plan dos not discriminate unfairly, and is fair and equtitable, with respect to each class of claims or interests that is impaired under the Code and has not acceptd the Plan.

4. All payments made or promised by the Debtor or by any persons issuing securities or acquiring property under

teh Plan or by any other person for services for costs and expenses in, or in connection with, the Plan and incident to this case, have fully disclosed to the Court and are reasonable or, if to be fixed after confirmation of the Plan, will subject to the approval of the Court.

5. The identity, qualifications, and affiliations of the persons who are to be directors or officers or voting trustees, if any, of the Debtor, after confirmation fo the Plan, have been fully disclosed, and the appointment of such to such offices, or their cotinuance therein, is equitable and consistent with the interests of the creditors and equity security holders and with public policy.

6. The identity of any insider who will be empolyed or retained by the Debtor and his/her compensation have been

fully disclosed.

7. The Plan complies with all other requirements under Section 1129 of Title 11.

IT IS ORDERED THAT:

The Plan fild by Kaonohi, Ltd. on Dec. 13, 1990, a copy of which is attached hereto as Exhibit "A", is confirmed. Notwithstanding any provisions of state law that might be to the contrary, distributions shall be made according to the Plan, and once all distributions have been made, Kaonohi Ohana Ltd. shall be dissolved.

DATED: Honolulu, Hawaii, April18, 1991

Jon Chinen

Judge of the Above-Entitled Court.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re

KAONOHI OHANA
Debtor

Case No. 86-00221
Chapter 11

ORDER GRANTING KAONOHI OHANA, LTD.'S MOTION TO COMPEL APPELLANT DR. ALEX FERREIRA TO POST BOND ON APPEAL

HEARD before the Hon. Jon Chinen on July 17, 1991

ORDER GRANTING KAONOHI OHANA, LTD.'S MOTION TO COMPEL APPELLANT DR. ALEX FERREIRA TO POST BOND ON APPEAL.

The debtor Kaonohi Ohana Ltd.. having filed a Motion to Compel Appellant Dr. Alex Ferreira to Post Bond on Appeal on June 25. 1991: a hearing having been held on the motion on Julv 17. 1991. at 8:15 a.m.. before the Honorable Jon J. Chinen: and Corev Park and Elizabeth Kent having appeared for the Debtor. and Curtis B. Ching having appeared on behalf of the Office of the U.S. Trustee: and

After due consideration of the memoranda and letters submitted to the Court and the matters raised at the

hearing upon oral argument. the Court finds as follows:

1. No grounds exist for imposition of sanctions upon the Debtor's counsel and Dr. Ferreira's request for imposition of such santions should be denied.

2. Distribution under the Debtor's Second Amended Plan of Reorganization (Supplemented). which was previouslv approved bv this Court. is affected bv the appeal filed bv Dr. Ferreira in that it will result in a delav in distribution of part of the estate. As a consequence. creditors. who have alreadv been waiting for distribution for a long time. will have further delavs. Some creditors have died during the pendencv of this action. and it is likelv that others

will pass away without ever receiving full disbursement unless a bond is obtained.

3. The issuance of a bond is therefore required to protect the interests of the creditors/shareholders.

THEREFORE, it is hereby ordered that:

1. Dr. Ferreira's request that sanctions be imposed on Debtor's counsel is denied.

2. The Debtor's Motion to Compet Appellant Dr. Alex Ferreira to Post Bond on Appeal is granted and Dr. Ferreira is hereby ordered to post a bond as follows:

a. In the amount of $150,000 to assure payment of any and all amounts for which Debtor Kaonohi Ohana may become liable, pursuant to Hawaii

Revised Statutes. Section 516-33. in the event that Dr. Alex Ferreira is successful in having Kaonohi Ohana. or its assigns sue any of its agents (as defined in Section 516-33. Haw. Rev. Stat.): and

b. In the amount of $15.000 to assure payment of any fees and costs incurred by Kaonohi Ohana in the prosecution of the appeal brought by Dr. Alex Ferreira from the Bankruptcy Cout's approval of the Second Amended Plan of Reorganization (Supplemented). now assigned Bankruptcy Appellate Panel No. HI-91-1558. and for which Dr. Ferreira may be determined to be liable.

c. The bond shall be posted within two week of the entry of this Order.

IT IS SO ORDERED

DATED: Honolulu. Hawaii. JULY 25. 1991.

HON. JON CHINEN

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re

Bankruptcy No.
86-00221

Kaonohi Chana Ltd.
Debtor

ORDER FINDING DR. FERREIRA IN CONTEMPT OF COURT AND DISMISSING APPEAL.

This matter came on for further hearing before this court on May 4, 1992 to determine whether Dr. Alex Ferreira (Dr. Ferreira) should be.....

held in further contempt of court. Elizabeth Kent, Esq. and James T. Paul, Esq. appeared on behalf of the Debtor, Kaonohi Ohana, Ltd. ("Ohana"): Dr. Ferreira appeared pro se. The court having reviewed the records and files herein, and having heard the arguments of counsel, hereby dismisses Dr. Ferreira's appeal of the July 25, 1991 Order.

BACKGROUND: On November 19, 1991, this court entered its Order Finding Dr. Alex Ferreira In Civil Contempt of Court for having wilfully disobeyed the July 25, 1991 Order of the Bankruptcy Court in failing to post a $165,000.00 supersedeas bond. The court, however, granted Dr. Ferreira thirty (30) days to purge himself of his contempt by promptly complying

with the order of the Bankruptcy Court to post bond. The court ruled that if the bond was not posted within thirty days, the court would dismiss Dr. Ferreira's appeal from the July 25, 1991 Order which is currently pending before this court.

This matter came on for further hearing before the court on December 27, 1991. The court at that time issued an order denying Dr. Ferreira's motion to transfer his appeal of July 25, 1991 Order to the Bankruptcy Appellate Panel. Dr. Ferreira also raised the defense of financial inability to post bond. The court accordingly continued the contempt hearing so as to allow Ohana to conduct discovery concerning Dr. Ferreira's financial condition. See

APP 19

Order Denying Motion For Transfer of Appeal And Continuing Proceedings On Order To Show Cause.

In accordance with this order, Ohana sent discovery requests to Dr. Ferreira seeking information on his financial ability to post the bond. Dr. Ferreira did not respond to these discovery requests, which prompted Ohana to file a motion to compel discovery. Before a hearing could be held on this motion, however, Dr. Ferreira withdrew his defense of financial inability to post bond, thereby mooting the motion.

Ohana accordingly withdrew its motion to compel, but reserved its right to seek sanctions against Dr. Ferreira for the time and expense it incurred in conducting the aborted

discovery.

The court also stated in this order that it would construe Dr. Ferreira's objections to the jurisdiction of the Bankruptcy Court to order the posting of a bond filed on December 24, 1991 as a motion to dismiss the July 25, 1991 Order requiring posting of bond, and further set it for hearing on May 4, 1992. As set forth below, Dr. Ferreira's objections to jurisdiction are directed to this court's power to find Dr. Ferreira in contempt and will be so treated.

This matter is once more before this court for continued hearing on the contempt proceedings. Having withdrawn his defense of financial inability to post bond, Dr. Ferreira

now contends that this court cannot hold him in contempt because the July 25, 1991 Order is "transparently invalid." Ohana contends that the July 25, 1991 Order constitutes a valid exercise of the Bankruptcy Court's powers and that this court should accordingly sanction Dr. Ferreira for his contempt of court by dismissing his appeal from the July 25, 1991 Order. Ohana also asks this court to further sanction Dr. Ferreira for the fees and costs it expended in attempting to obtain discovery from Dr. Ferreira.

DISCUSSION

Dr Ferreira's basic challenge to the contempt order is that the underlying order upon which it is based is invalid, and therefore, this

court cannot hold him in contempt for violating an order which the bankruptcy court had no jurisdiction to enter. Ohana states that Dr. Ferreira's attack on the underlying order is essentially an improper collateral attack on the Bankruptcy Court's order. See United States v. Jaeger, 117 F.2d 483, 487 (2nd Cir. 1941) (in contempt proceedings, no attack can be made on the regularity, correctness, or validity of the original order).

The collateral bar rule permits a judicial order to be enforced through criminal contempt even though the underlying decision may be incorrect and even unconstitutional. See United States v. Mine Workers, 67 S. Ct. 677, 696 (1947). Accordingly, the

contemnor cannot ordinarily raise the invalidity of the judicial order as a defense to a contempt charge. In re Establishment Inspection of Hern Iron Works, Inc., 881 F.2d 722, 726 (9th Cir. 1989).

There are, however, several exceptions to the collateral bar rule. First, if a court issues an order without personal or subject matter jurisdiction, the decree may be violated without incurring the penalty of criminal contempt. Id. at 726. If the court lacks jurisdiction, "the original order is deemed a nullity, and the accused contemnor cannot be fairly punished for violating nothing at all." Id. at 727. Dr. Ferreira does not contend that the bankruptcy court lacked personal or subject

matter jurisdiction in this case.

Second, there is an exception for court orders that are "transparently invalid." It is this exception which Dr. Ferreira states is applicable to the present case. (See footnote #2 below). This exception was recognized in Matter of Providence Journal, 820 F.2d 1342 (1st Cir. 1986). In Providence, the First Circuit discussed how an order issued by a court without jurisdiction was not protected by the collateral bar rule because otherwise a court could wield power over parties or matters not within its authority - "a concept inconsistent with the notion that the judiciary may exercise only those powers entrusted to it by law". Id at 1347.

(Footnote #2: The third exception is for cases where compliance with the order would subject the objecting party to self-incrimination as set forth in Maness v. Meyers, 95 S.Ct. 584, 592 (1975). This exception is also not applicable here).

The Court then stated:

"The same principle supports an exception to the collateral bar rule for transparently invalid court orders. Requiring a party subject to such an order to obey or face contempt would give the courts powers far in excess of any authorized by the Constitution or Congress. Recognizing an exception to the collateral bar rule for transparently invalid orders does not violate the principle that "no man can be judge in

his own case" anymore than does recognizing such an exception for jurisdictional defects. The key to both exceptions is the notion that although a court order--even an arguably incorrect court order--demands respect, so does the right of the citizen to be free of clearly improper exercises of judicial authority. Although an exception to the collateral bar rule is appropriate for transparently void orders, it is inappropriate for arguably proper orders. This distinction is necessary both to protect the authority of the courts when they address close questions and to create a strong incentive for parties to follow the orderly process of law. No such

protection or incentive is needed when the order is transparently invalid because in that instance the court is acting so far in excess of its authority that it has no right to expect compliance and no interest is protected by requiring compliance." Id. at 1347. The Ninth Circuit has stated that ". . . The foundation of this exception is that the contempt power is not a basis for a court to exceed the limits of its authority. According to proponents of this exception, even a court of court of proper jurisdiction lacks the naked power to reduce constitutional rights without a colorable basis in the law." Hern, 881 F.2d at 727. Although the facts in Hern did not support

application of the exception in that case. the Ninth Circuit did state that it might ultimately prove amenable to such a rule. Id.

Dr. Ferreira contends that the Bankruptcy Court flouted the normal limits of judicial authority in requiring him to post a bond as a condition to his filing of his appeal from the reorganization order. Dr. Ferreira contends that although he filed an appeal from the order, he did not seek a stay of the judgment and therefore, he did not have to post a bond. Dr. Ferreira cites to Rule 62(d) of the Federal Rules of Civil Procedure (hereinafter "Rule").

Rule 62 (d) provides that when an appeal is filed, an appellant, by giving a supersedeas bond, may obtain

a stay of the action. The posting of a bond is not a mandatory requirement of appeal, but rather only serves to stay the judgment and preserve the collateral pending the outcome of the appeal. In re Farrell Lines, Inc., 761 F.2d 796, 797 (D.C. Cir. 1985); Koster v. Massey, 262 F. 2d 60, 61 (9th Cir. 1958).

In Farrell, Safir filed an involuntary bankruptcy petition against Farell. Finding the petition lacking in merit, the Bankruptcy Court dismissed the action and granted Farrell's motion to require Safir to post a bond to secure the judgment pending appeal. Safir appealed the dismissal of his petition, and in addition moved the District Court to be relieved of the bond requirement.

The District Court denied Safir's motion to be relieved of the bond requirement and dismissed Safir's appeal for failure to post the bond required by the Bankruptcy Court. The Federal Circuit Cout of Appeals reversed:

"We hold that the District Court erred in dismissing Safir's appeal for failure to post bond. Bankruptcy Rule 8005, on which the Bankruptcy Court based its authority, allows the court to require bond as a condition for a stay pending appeal. That rule nowhere provides that posting bond may be made a prerequisite to a party's right to appeal. Similarly, under Federal Rule of Civil Procedure 62, which is made applicable to bankruptcy proceedings by Bankruptcy

Rules 1018 and 7062. it is well-established that an appellant who fails to furnish a supersedeas bond does not thereby lose his right to appeal. 761 F.2d at 797 (footnote and citations omitted).

Ohana. on the other hand. cites to (1) 11 U.S.C. Section 105 (a). which authorizes the Bankruptcy Court to issue "any order. process or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. and (2) Rule 8005 of the Bankruptcy Rules which authorizes the Bankruptcy Court to "make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." Rule 8005" is by its design a flexible

tool which permits a Bankruptcy Court to uniquely tailor relief to the circumstances of the case, so that the appellate process will neither undo nor overwhelm the administration of the bankruptcy case." Gleasman v. Jones, Day, Reavis & Pogue, 111 B.R. 595, 599 (Bk. W.D. Tex. 1990).

By order dated May 22, 1991, the Bankruptcy Court approved Ohana's Second Amended Plan of Reorganization (hereinafter "May 22, 1991 Order"), which permitted an immediate distribution to the creditors and the dissolution of the creditors' corporation, Ohana. Dr. Ferreira appealed this order insofar as it denied his request that he be assigned Ohana's alleged claim against its directors and officers. If Dr.

Ferreira prevails on his appeal, he could be assigned the right to sue the directors and officers for alleged wrongdoing. Ohana, however, would have the statutory duty under Section 415-5, Hawaii Revised Statutes, to indemnify those officers and directors if they prevailed in such a suit.

Thus, the effect of Dr. Ferreira's appeal was to stay the May 22, 1991 Order and prevent final distribution of the estate, because as long as there was any chance that the directors and officers would be sued, Ohana had to retain funds in its estate to satisfy that contingency. In its July 25, 1991 Order requiring the posting of a bond, the Bankruptcy Court found:

"2. Distribution under the

Debtor's Second Amended Plan of Reorganization (Supplemented), which was previously approved by this Court, is affected by the appeal filed by Dr. Ferreira in that it will result in a delay in distribution of part for a long time, will have to endure further delays. Some creditors have died during the pendency of this action, and it is likely estate. As a consequence, creditors, who have already been waiting for distribution for a long time, will have to endure further delays. Some creditors have died during the pendency of this action, and it is likely that others will pass away without ever receiving full disbursement unless a bond is obtained."

"3. The issuance of a bond

is therefore required to protect the interests of the creditors/shareholders."

Accordingly, this court cannot find that the issuance of the bond order was in excess of the Bankruptcy Court's authority or in excess of its jurisdiction in these unique circumstances. The issuance of the bond was appropriate to protect Ohana and its creditors under the court approved reorganization plan and was appropriate in the exercise of the Bankruptcy Court's authority to require a bond on appeal to protect the interests of the creditors. Further, unlike situation in Farrell, the Bankruptcy Court did not require the posting of the bond as a condition to Dr. Ferreira's maintaining his

appeal of the July 25, 1991 Order. Rather, the Bankruptcy Court issued an order requiring that Dr. Ferreira post a bond to protect the creditors of the bankruptcy estate. Dr. Ferreira's appeal of the underlying May 22, 1991 Order proceeds before the Bankruptcy Appellate Panel and is not affected by the July 25, 1991 Order.

Dr. Ferreira has withdrawn his defense of inability to post the bond, and in light of that withdrawal and this court's finding that the underlying Bankruptcy Order was not transparently invalid, this court finds Dr. Ferreira in contempt of court. The court notes that Dr. Ferreira refused to post the bond, and instead of attempting to obtain a stay of the July 25, 1991 Order in order to

challenge it on appeal, chose to challenge the authority of the Bankruptcy Court by refusing to recognize its authority. Under these circumstances, the court finds that the dismissal of Dr. Ferreira's appeal of the July 25, 1991 Order is appropriate.

CONCLUSION

The court having found Dr. Ferreira in civil contempt of court, and Dr. Ferreira having failed to purge his contempt, and having failed to put forth any evidence of his inability to comply with the July 25, 1991 Order, the court hereby orders Dr. Ferreira's appeal of the July 25, 1991 Order dismissed.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii,

APPENDIX

APP 38

MAY 5, 1992

DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

In re Kaonohi Ohana, Ltd., Bk. No. 85-00221: ORDER FINDING DR. FERREIRA IN CONTEMPT OF COURT AND DISMISSING APPEAL

APP 39

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: KAONOHI OHANA
Debtor
Alex Ferreira, MD — No. 92-16084

Appellant, — BAP# HI-91-1558
vs. — ASPO

Nancy Sutherland et al — ORDER

Appellees.

Before: SCHROEDER, FLETCHER AND NOONAN, Circuit Judges.

On Sept. 21, 1992, this court ordered appellant to comply with the Bankruptcy Court order compelling him to post a bond pending appeal by Oct. 5, 1992. Appellant requested and granted two extensions of time to file proof of payment of the bond. On Nov. 20, 1992, appellant filed "Evidence of Efforts to Comply". Appellant has failed to comply with this court's order. Accordingly, this appeal is dismissed.

The clerk is instructed to accept no further filings in this closed appeal.

FILED 11/27/92